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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (Appendix A to the Jurisdictional Statement of the Interstate Commerce Commission)[1] is reported at 199 F. Supp. 635. The opinion of the Commission (ICC App. C) is reported at 313 ICC 23.

JURISDICTION

The judgment of the district court (ICC App. B) was entered on January 8, 1962, and notices of appeal were filed by the United States and the Interstate

[1] The Appendices to the Commission's Jurisdictional Statement will hereafter be referred to as "ICC App. A," etc.

Commerce Commission on March 9, 1962.[1a] This Court's jurisdiction on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b), and is sustained by *United States* v. *Central Vermont Ry., Inc.*, 366 U.S. 272, and *Interstate Commerce Commission* v. *J-T Transport Co., Inc.*, 368 U.S. 81.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding 1, and Sections 15(7), 15a, 305(c), and 307(d) of the Interstate Commerce Act, 49 U.S.C. 15(7), 15a, 905(c), 907(d), are set forth in Appendix D to the Jurisdictional Statement of the Interstate Commerce Commission.

QUESTIONS PRESENTED

Appellee railroads proposed substantially reduced rates for trailer-on-flatcar service between certain points also served by coastal water carriers. The reduced rates, which exceeded the railroads' out-of-pocket costs in all cases and in many instances exceeded fully distributed costs, were at the level of the water carriers' rates for the same traffic, but were substantially below the level maintained by the railroads for similar traffic between points not served by the water carriers. The Interstate Commerce Commission cancelled the reductions on the ground that the water carriers could not compete with railroads at equal rates and the reductions were the final step in a general rate-cutting program which threatened the water carriers' continued existence. The questions presented are:

1. Whether, in the light of the National Transportation policy and Section 15a(3) of the Interstate Com-

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[1a] On May 8, 1962, the district court granted an extension of time for filing the jurisdictional statement to May 16, 1962.

merce Act, the Commission was barred from canceling the reduced rail rates without a finding that the water carriers, from the standpoint of overall operating, constitute a lower-cost mode of transportation than the railroads.

2. Whether, if the overall cost of water transportation is lower than that of rail transportation, the Commission would nonetheless be barred from canceling a rail rate which yields the fully-distributed cost of the particular movement when that cost is lower than the fully distributed cost of the competing water carriers for that movement.

STATEMENT

This case involves the validity of an order of the Interstate Commerce Commission directing the cancellation of substantial reductions proposed by several railroads on some 66 commodity rates for trailer-on-flatcar (TOFC) service between various points in the East, on the one hand, and Dallas and Ft. Worth, Texas, on the other. The proposed rates were limited to points served by the only deep-water common carriers now engaged in the Atlantic-Gulf coastwise trade, Sea-Land Service, Inc. (formerly Pan-Atlantic Steamship Corporation), and Seatrain Lines, Inc.

1. Sea-Land provides an Atlantic-Gulf coastwise service by motor-water-motor. Freight is moved by certificated motor carriers (or by use of Sea-Land's own motor equipment) in highway trailers over the road to the port of origin, where the trailers are lifted onto Sea-Land ships for movement via water to the destination ports. At the destination ports, the process is reversed. This service was instituted by

Sealand in 1957 when substantial increases in its operating costs as a break-bulk [2] water carrier led it to suspend its Atlantic-Gulf break-bulk service and convert four vessels into trailerships, each capable of holding 226 demountable truck trailers. Conversion to the more efficient trailership service has reduced Sea-Land's operating costs and has brought about a reduction in both cargo-handling time and in-port vessel time.

Seatrain provides Atlantic-Gulf coastwise service by rail-water-rail. Freight is transported to its dock at Edgewater, New Jersey, in railroad cars. The cars and their contents are then lifted onto Seatrain's vessels for carriage by water to Atlantic and Gulf ports. The cars then move by rail to the consignee. This service offers the shipper transportation in a single rail car from consignor to consignee.

The railroad TOFC service involved here is a motor-rail-motor operation in which a motor carrier trailer loaded by the shipper is hauled by road to a railhead, where it is loaded onto a flatcar, and demounted at destination for delivery by motor carrier to the consignee. Although this type of service has been furnished sporadically since 1926, it has grown in recent years, and the TOFC service between the points covered by this proceeding was inaugurated in the summer of 1956.

Traditionally, water rates, including water-rail and water-motor rates, have been lower than the corres-

[2] Break-bulk service involves the physical unloading of freight from rail-car or truck into ships at the port of origin and the reverse operation at destination.

ponding all-rail rates. Water service has also been slower, less frequent, and more perilous. When Sea-Land inaugurated its new trailership service in 1957, it published rates which were, in general, 5 to 7½ per cent lower than the corresponding all-rail boxcar rates, a narrower differential than that which had theretofore existed.

2. By schedules filed to become effective on November 14, 1957, and later, the railroads proposed to establish the reduced TOFC rates at issue.[3] Upon the protests of the Secretary of Agriculture, Sea-Land, Seatrain, and other interested parties, the rates were suspended and placed under investigation. On December 19, 1960, the Commission issued its report and accompanying order.

The Commission found that the proposed TOFC rates equaled or exceeded out-of-pocket costs for all listed movements by railroad-leased TTX[4] cars and for all but six movements by railroad-owned cars, and equaled or exceeded fully distributed costs for 43 of 66 movements by TTX cars and for 14 of 66 movements by railroad-owned cars (ICC App. C, p. 74).

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[3] Since the establishment of these rates would leave higher rates in effect to and from intermediate points involving shorter hauls in violation of the long-and-short-haul provisions of Section 4(1) of the Act, 49 U.S.C. 4(1), the railroads also applied to the Commission for the relief from those provisions which Section 4(1) permits the Commission to authorize "in special cases." See *A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324.

[4] TTX cars are flatcars leased by the railroads which hold two trailers; railroad-owned cars have a capacity of one trailer per car (ICC App. C, p. 73). No finding could be made as to the relative percentages of traffic which would move under the proposed rates in either type of car (*id.* at 74).

Therefore, the Commission concluded that with the exception of the six rates returning less than out-of-pocket costs—rates which were withdrawn by the railroads and are not at issue here—the proposed rates were compensatory (*id.* at 74, 87). Similarly, the corresponding Sea-Land and Seatrain rates were, with one exception, found to be compensatory (*id.* at 72–73, 77, 87).

With respect to the relative costs of the competing modes of transportation, the Commission found that Sea-Land's costs of moving the traffic, both out-of-pocket and fully distributed, are uniformly below the railroads' costs for similar TOFC movements using railroad-owned flatcars, and are below the TOFC costs using TTX cars for all but two of the 66 movements (ICC App. C, pp. 73, 90). However, the Commission indicated that it was not resting its decision on relative costs. Because of certain variables affecting costs and the absence of rail cost data relating to some of the rates, the Commission said that it was unable to determine whether rail or water was the low-cost mode of transportation. The Commission further said: "We must recognize, also, that cost is only one of the elements which may appropriately be considered in passing upon the lawfulness of rates. In the exceptional circumstances here presented, other considerations, herein discussed, appear to us determinative of the issues" (*id.* at p. 91).

The Commission found that the perils of ocean transport, infrequency of sailings, and transit time longer than that in rail TOFC service are factors

in both Sea-Land and Seatrain service (ICC App. C, pp. 61, 63, 79–81); that, by reason of these factors, Seatrain offers a lower-quality service than TOFC (*id.* at 78–90); that there is no indication that Sea-Land has moved any traffic at rates as high as competing rail boxcar or TOFC rates (*id.* at 73, 88); that most shippers prefer railroad service to Sea-Land service unless the latter is available at lower rates (*id.* at 88); and that, in order to attract traffic, Sea-Land and Seatrain must maintain rates lower than those of the rail carriers (*ibid.*). It also found that all of Sea-Land's service is subject to rail competition; that Sea-Land must recover fully-distributed costs on its overall operations if it is to continue in operation; and that, if the lower rates which Sea-Land is competitively required to maintain are reduced to a point which fails to yield operating costs plus a reasonable return on investment, Sea-Land's operations will become unprofitable and their continuance will be jeopardized (*id.* at 89). Finally, the Commission expressly found that the "reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operations, and thus the continued existence, of the coastwise water-carrier industry generally" (*id.* at 92).

Section 15a(3) of the Interstate Commerce Act, 49 U.S.C. 15a(3), prohibits holding a carrier's rates to a particular level to protect the traffic of another mode of transportation. The Commission noted, however, that this prohibition is qualified by the words "giving

due consideration to the objectives of the national transportation policy declared in this Act" (ICC App. C, p. 91). It then pointed out (*id.* at 91–92):

> It is the declared national transportation policy, among other things, to provide for fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers, all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.

The Commission observed that the importance of coastwise shipping for national defense purposes has been repeatedly emphasized by various governmental agencies and that it is an integral element of the national transportation system (*id.* at 93–94). Further, the Commission reasoned that Sections 305(c) and 307(d) of the Act, 49 U.S.C. 905(c), 907(d) were indicative of a Congressional intent to accord an essential, efficiently-operated water carrier an advantage in the form of lower rates, where this was necessary to enable it to participate in the economical movement of traffic (*id.* at 95–96).

The Commission concluded (ICC App. C, p. 96):

> In the circumstances presented here, we are of the opinion that the objectives of the national transportation policy require the estab-

> lishment and maintenance of a differential relationship between the rates under investigation on Sea-land and Seatrain service, on the one hand, and the rates of the rail carriers, on the other, which will allow these water carriers operating in the coastwise trade to maintain rates that will enable them to continue efficient and economical coastwise service.

Although it thought the 10 per cent differential sought by Sea-Land to be excessive, the Commission stated that, in its judgment, the TOFC rates at issue should be held at 6 per cent above Sea-Land's rates so long as the latter are not increased above their present levels (*id.* at 96-97). Accordingly, the Commission found that the proposed TOFC rate reductions were not shown to be just and reasonable and directed their cancellation without prejudice to the filing of new schedules in conformity with the Commission's conclusions.

3. On February 2, 1961, the railroads filed their complaint in the district court seeking to set aside the Commission's order to the extent that it required cancellation of the proposed TOFC rates. Sea-Land and Seatrain intervened and appeared in defense of the order. On November 15, 1961, the court rendered its opinion, holding that the order requiring cancellation of the TOFC rates should be set aside and that the Commission should be enjoined from cancelling TOFC rates which return the fully-distributed costs of carriage (ICC App. A, pp. 46-47).

The court held that to require a differential between rail and water rates merely for the protection

of the water carriers would be a violation of Section 15a(3), and that the National Transportation Policy does not lead to a different conclusion (ICC App. A, pp. 31–32).[5] At the heart of the court's decision was its conclusion that the Commission could not take steps to preserve the water carriers from the destruction which it found to be threatened unless it also found either (1) that the proposed rail rates were unduly low, viewed from the standpoint of rail costs, or (2) that those rates would deprive the water carriers of the inherent advantages which they would be entitled to maintain if they established that they were the low-cost carriers (*id.* at 34–35, 37–38). Since the Commission did find that the proposed rail rates would cover the railroads' out-of-pocket costs, there was no basis, the court held, for striking down those rates in the absence of a specific finding that water transportation was the low-cost mode from the standpoint of overall operations. The court further instructed the Commission that, even if water transportation was, overall, the low-cost mode, an individual rail rate could not be struck down if it equaled or exceeded the railroad's fully distributed costs (*id.* at 47).

THE QUESTIONS ARE SUBSTANTIAL

Section 15a(3) of the Interstate Commerce Act states that "[r]ates of a carrier shall not be held up

[5] The court held that the national defense clause of the National Transportation Policy was merely a "hoped-for 'end,'" not an "operative policy," and that, in any event, the Commission's finding that the proposed rail rates would interfere with the national defense was not supported by the evidence (ICC App. A, pp. 43–44).

to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy * * *." The issues in this case concerning the meaning of this provision go to the heart of the continuing controversy over the proper role of government in regulating competition between different modes of transportation, in this case rail and water carriage. The decision below establishes standards for ratemaking which sharply contravene long standing policies of the Interstate Commerce Commission. Moreover, the proper interpretation of Section 15a(3) is a problem which arises in virtually every Commission proceeding concerning traffic subject to competition between different forms of transportation. See, *e.g.*, Motion of the United States and Interstate Commerce Commission to Affirm, p. 10, *Eastern Express, Inc.* v. *United States*, affirmed, 369 U.S. 37. Thus, the guidelines which emerge from this litigation will do much to shape the future transportation system of the nation.

The United States will not attempt, at this point, to elaborate its views as to the merits of the decision below. Although we actively participated in the defense of the Commission's order in the district court, we filed a supplemental brief which departe. in some respects from the views held by the Commission. Since that time, the President has announced a program which is intended to remedy many of the present inadequacies in the regulation of various modes of transportation. Message from the President of the United States, H. Doc. No. 384, 87th Cong., 2d

Sess.; S. 3242, 87th Cong., 2d Sess. Problems closely related to those raised by this case are the subject of continuing study by Congress and by the Executive Branch. See, *e.g.*, U.S. Department of Commerce, *Federal Transportation Policy and Program* (March 1960); Williams & Bluestone, *Rationale of Federal Transportation Policy* (U.S. Department of Commerce, April 1960); Special Study Group on Transportation Policies in the United States, *National Transportation Policy,* Senate Interstate and Foreign Commerce Committee, 87th Cong., 1st Sess. (Comm. Print). It suffices, we believe, at this stage of the proceedings before this Court, to state our view that the questions here presented are of substantial importance and that they fully warrant plenary consideration.

CONCLUSION

For the foregoing reasons, the United States believes that probable jurisdiction should be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LEE LOEVINGER,
Assistant Attorney General.
LIONEL KESTENBAUM,
JOEL E. HOFFMAN,
Attorneys.

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